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Supreme Court of the United States

OCTOBER TERM, 1983

HARRY LEVINE, ALBERT RAGUSA, LOUIS WITKIN, ETHEL EPSTEIN and MICHAEL PRESNICK, NANCY VALE and SIDNEY PUDELL, individually and as Chairman, Secretary and Treasurer, respectively, of CITIZENS PARTY OF OCEAN BEACH, an unincorporated association,

Petitioners,

v.

ARTHUR R. SILSDORF,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION

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No.

IN THE

Supreme Court of the United States

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners Harry Levine, Albert Ragusa, Louis Witkin, Ethel Epstein and Michael Presnick, Nancy Vale and Sidney Pudell, individually and as Chairman, Secretary and Treasurer, respectively, of Citizens Party of Ocean Beach, respectfully pray that a writ of certiorari issue to review the judgment, entered May 3, 1983, of the Court of Appeals of the State of New York.

THE QUESTION PRESENTED FOR REVIEW

Should the court below have dismissed this libel action once it determined that the allegedly defamatory statements, made in the course of a political campaign, constituted opinions based upon stated facts?

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Opinions Below

The opinion of the New York Court of Appeals reversing the decision of the Appellate Division and denying the motion of defendants to dismiss the complaint (thereby reinstating the order of the Supreme Court, New York County), is set forth as Appendix Exhibit A. The decision is not yet reported.

The opinion of the Appellate Division, reversing the order of the Supreme Court, New York County, and granting the motion of defendants to dismiss the complaint is set forth as Appendix Exhibit B. It is reported at 85 A.D.2d 297, 447 N.Y.S.2d 936.

The opinion of the Supreme Court, New York County, denying the motion of defendants to dismiss the complaint is set forth as Appendix Exhibit C.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 3, 1983. The jurisdiction of this Court to review that judgment is invoked pursuant to 28 U.S.C. § 1257(3), because petitioners have claimed as an absolute defense to this action the privilege from liability extended by the First Amendment to statements of opinion.

Statement of the Case

This case arises out of the 1978 mayoral campaign in the Village of Ocean Beach, New York. During the campaign, petitioners circulated a letter (the "Campaign Letter") to their neighbors in opposition to the candidacy of the incumbent mayor, Arthur R. Silsdorf ("Silsdorf"). A copy of the Campaign Letter is set forth as Appendix Exhibit D. The Campaign Letter questioned whether Silsdorf's involvement, as an attorney in private practice, with commercial ventures in Ocean

Beach was affecting his willingness, as mayor, to control the spread of that commercialization. It also criticized the mayor for relieving members of the Village Board of Trustees of their official duties and assuming them himself, thereby instituting one-man rule over the village.

The penultimate paragraph of the Campaign Letter, and the focus of the complaint in this action, reads as follows:

> There are many of us who recognize Arthur Silsdorf's service to the village in the past, and who have supported him in the past. But we also recognize that "power tends to corrupt, and absolute power corrupts absolutely." There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach.

By their rhetorical use of the famous and commonplace political aphorism of Lord Acton, penned by him in 1887, petitioners intended to and did express their opinion, based upon facts stated within the Campaign Letter, that Silsdorf's actions constituted an abuse of power.

The Complaint and Prior Proceedings

Plaintiff's complaint in this action, dated March 21, 1979, is set forth as Appendix Exhibit E. The complaint drew four isolated sentences or phrases from different parts of the Campaign Letter and deceptively reconstructed them into what appeared to be a single passage. The focus of that construction, and the target of plaintiff's complaint, was the sentence: "There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach." The complaint attempted to paint that last excerpted statement of opinion, taken out of context, as a charge of criminal activity. The complaint did not challenge the accuracy of any of the factual assertions underlying the opinion in the Campaign Letter or allege them to be defamatory.

In their answer to the complaint, dated April 12, 1979, and set forth as Appendix Exhibit F, defendants pleaded as an affirmative defense the privilege extended to their Campaign Letter by the First Amendment.

On November 12, 1980, defendants served notice of their motion to dismiss the complaint, based upon two separate grounds: first, that the complaint was directed only at their constitutionally protected expressions of opinion, and second, that the statement at issue, properly read in context, was an extension of a familiar cliche which is commonly used in social and political rhetoric, and cannot reasonably be understood to be defamatory.

Defendants' motion to dismiss was denied by the Supreme Court, New York County. Defendants appealed, and the Appellate Division, First Department, granted the appeal by order dated March 16, 1982, and dismissed plaintiff's complaint.

The Decision From Which Review is Sought

The New York Court of Appeals reversed the order of the Appellate Division, First Department, and restored plaintiff's complaint. In its opinion, the court recognized that it had the duty to determine, as a matter of law, whether the statements complained of by plaintiff were statements of fact, or of opinion. The Court of Appeals held that the allegedly libelous statements were unmistakably statements of opinion: "Although the distinction between fact and opinion may be difficult to draw in some cases, the conclusory statements in defendants' letter are clearly set forth in the form of opinion." (Appendix Exhibit A, at A-4.)

The Court of Appeals erroneously concluded, however, that the correctness of the opinions expressed by the defendants could be subjected to review by a jury:

> Clearly, the validity of the opinions expressed in the letter, as viewed by the average reader, could be affected

> by whether the facts as stated by defendants or those now alleged by plaintiff were before the reader. That being the case, *plaintiff may be able to establish entitlement to recover damages for the defamatory opinions*, assuming, of course, that he is able to demonstrate the falsity of the letter's statements of fact and convince the triers of fact that the factual disparities would affect the conclusions drawn by the average reader regarding the validity of the opinions expressed.

(Appendix Exhibit A at A-7, emphasis added.) In addition, the Court of Appeals determined that the opinions expressed by defendants were actionable because they might be construed as opining that plaintiff had committed criminal acts while in office.

THE REASONS FOR GRANTING THE WRIT

Summary of the Argument

A writ of certiorari should issue to review the decision of the New York Court of Appeals because it fundamentally conflicts with the constitutional privilege afforded to expressions of opinion on matters of public concern. This privilege has been recognized by this Court and the highest courts of other states.

As a matter of federal constitutional law, the court below should have dismissed this action once it determined that the statements complained of were expressions of opinion based upon stated facts. Instead, in direct contravention of applicable precedent, it held that the validity of an opinion expressed in the course of a political campaign may be reviewed by a jury in a damage action.

This constitutionally defective rule will significantly chill the exercise of free speech in New York, particularly in the context of political disputes, where the exercise of free speech

should be most encouraged. Moreover, the New York rule announced here conflicts with the correct rule applied by the federal courts and other states. The stature of New York's highest court, and the concentration of the media in New York, ensure that the rule announced here will have application far beyond the scope of this case.

The impact of this opinion upon the law of defamation and upon the exercise of free speech is substantial and immediate. In addition, this decision could escape review if petitioners are successful at trial. Accordingly, in the present posture of this action, review of this decision is warranted.

The New York Court of Appeals Improperly Held that an Expression of Opinion May be Actionable

Under the landmark decision of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a plaintiff alleging defamation bears the burden of proving, among other things, that an allegedly defamatory statement is false. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), however, this Court recognized that opinions cannot be true or false, and thus cannot be made the basis of a libel action:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

418 U.S. at 339-40. Thus, when a court, as a matter of law, determines that allegedly defamatory statements are expressions of opinion, that determination should terminate the action. As the *Gertz* opinion doctrine plainly establishes, judges and juries cannot constitutionally be made the arbiters of the reasonableness or validity of opinions expressed in the public arena.

Gertz leaves for the courts the task of distinguishing statements of fact from statements of opinion. It has been

recognized by courts and commentators that statements calculatedly made in the guise of opinion may be intended to imply the existence of undisclosed defamatory facts. For that reason, following *Gertz*, the American Law Institute radically revised its prior statement of the law of defamation and expressed its view that:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Restatement (Second) of Torts § 556 (1977).

The *Gertz* opinion doctrine and the Second Restatement's views on opinion have been adopted as the majority view by state and federal courts, including, at least prior to the decision in this action, the courts of New York. *See Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977):

> Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth. . . .
>
> The expression of opinion, even in the form of pejorative rhetoric, relating to fitness for judicial office or to performance while in judicial office, is safeguarded. . . . Erroneous opinions are inevitably put forward in free debate but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience. . . . Plaintiff may not recover from defendants for simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be.

42 N.Y.2d at 380-81, 397 N.Y.S.2d at 950 (citations omitted).

It is significant that this rule does not require that the facts "prove" the opinion or that a court consider the opinion to be justified by its stated premises. *See Holy Spirit Association v. Sequoia Elsevier Publishing Co.*, 75 A.D.2d 523, 524, 426 N.Y.S.2d 759, 760 (1st Dep't 1980) ("opinions, even if bizarre, and even if they have no sound basis in the facts which the writer characterizes by these opinions, are still constitutionally protected").

In the opinion for which review is sought here, the New York Court of Appeals should have dismissed this action once it determined that the allegedly libelous statements were statements of opinion based upon stated facts. Instead, without any support, the Court of Appeals held here that a jury could consider whether the allegedly defamatory opinions contained in the Campaign Letter were invalid based upon the alleged falsity of the underlying facts, which are not themselves alleged to be defamatory. This clearly erroneous holding flies squarely in the face of the *Gertz* opinion doctrine.

The New York Court of Appeals Decision Conflicts with the Majority Rule of other State Courts

Since *Gertz* was decided, the overwhelming majority of state courts considering the issue has adopted the rule that in the context of public issues, statements of opinion are absolutely privileged, and that the only statements made in the form of opinion which are not so protected are those which imply the existence of undisclosed, defamatory facts. *See, e.g., Hawkins v. Oden*, ____R.I.____, 459 A.2d 481 (1983); *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, *cert. denied*, ____ *U.S.*____, 103 S. Ct. 211 (1982); *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462, *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (1982); *Okun v. Maple Properties*, 29 Cal. 3d 442, 175 Cal. Rptr. 157, 629 P.2d 1369, *cert. denied*, 454 U.S. 1099 (1981); *Pease v. Telegraph Publishing Co.*, 121 N.H. 62, 426 A.2d 463 (1981); *Myers v. Boston Magazine Co., 80 Mass. Adv. Sh. 907, 403 N.E.2d 376 (1980); Anton v. St. Louis Suburban News-*

papers, Inc., 598 S.W.2d 493 (Mo. Ct. App. 1980); *Bucher v. Roberts*, 198 Colo. 1, 595 P.2d 230 (1979); *National Association of Government Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980); *Good Government Group of Seal Beach, Inc. v. Hogard*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 (1978), *cert. denied*, 441 U.S. 961 (1979).

Some of these cases involve the expression of opinions in the context of political disputes and are strikingly similar to this case. In none of those cases was it held that non-defamatory facts set forth in support of opinion should or could be scrutinized by a jury to determine whether a restatement of those facts would alter the "validity" of the opinion expressed.

Thus, in a California case involving a referendum held to accept or reject a special zoning ordinance needed by a private developer, a letter to the editor of the *Los Angeles Times* which in part described the affected residents as "suspicious" of the motives of the city council members who originally approved the ordinance and commented that the developer had become the law client of one of those council members was found not to be libelous under the *Gertz* opinion doctrine. The California Supreme Court held that:

> The implication that [the council member] and other council members were motivated by selfish interest rather than the public good is well within the bounds of protected political debate. . . . A statement regarding (1) a public official's business, social, or political affiliations, and (2) how those affiliations seem reflected in decision-making hardly constitutes a libelous charge of bribery and corruption. A contrary ruling would inhibit a significant segment of the discourse vital in a democracy.

Okun v. Maple Properties, 29 Cal.3d at 451, 175 Cal. Rptr. at

162, 629 P.2d at 1374 (citations omitted).

The California Supreme Court specifically noted that a formal assertion that facts recited in the letter were false added nothing: "Their falsity, if proved, would not make them defamatory." 29 Cal.3d at 452, n.1, 175 Cal. Rptr. at 163, n.1, 629 P.2d at 1375 n.1 (citation omitted).

Similarly, summary judgment was granted in a New Jersey libel action based upon a "letter to the editor" which raised the question of whether the mayor and the tax assessor of a New Jersey town were engaged in "covering up" the names of property owners delinquent in paying taxes. *Kotlikoff v. Community News,* 89 N.J. 62, 444 A.2d 1086 (1982). The New Jersey Supreme Court adopted the rule that only opinions which implied the existence of false, *defamatory* facts could be actionable, and noted that it understood the New York decision in *Rinaldi, supra,* to place opinions which constituted accusations of criminal conduct in that category. *Kotlikoff v. Community News,* 89 N.J. at 71, 444 A.2d at 1090.

The New York Court of Appeals Decision Chills Speech on Public Issues by Imposing Liability upon "Invalid" Opinions

Failure to review this decision would allow a rule to stand that directly undercuts the principles underlying this Court's decision in *New York Times v. Sullivan.* That decision was based upon the twin principles that disputes over public issues should be resolved in the public marketplace of ideas and opinions, and that debate over such issues should be wide-ranging and vigorous:

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

New York Times v. Sullivan, 376 U.S. at 270.

This Court has applied the *New York Times* principles with particular emphasis to cases involving candidates for public office. In *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-301 (1971), the Court applied the *New York Times* libel standard to a libel case brought by the mayor of a small Florida town:

> Public discussion about the qualification of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule.

The point was perhaps most clearly expressed by this Court in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), a libel action brought by a candidate in a New Hampshire Democratic primary for United States Senator:

> [I]f it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," . . . then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.
>
> * * *
>
> The principal activity of a candidate in our political system, his "office," so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of "purely private" concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry "Foul!" when an opponent or an industrious reporter attempts to demonstrate the contrary.

401 U.S. at 271-72, 274.

Directly contravening these constitutionally established policies, the decision of the New York Court of Appeals encourages the second-guessing of the validity of expressions of opinion, made in the course of an election by a judge or jury far removed in time and interest from the publication of the opinion. Under the rule announced in this case, participants in public debates over timely issues must be prepared to meet more than the rigors of public debate; they must also ensure that their political opinions will withstand the test of time.

The New York Court of Appeals opinion in this case improperly and improvidently thrusts the courts into the role of arbiters of the "validity" of expressions of opinion on public issues. That such a burden should be imposed in any jurisdiction would be cause for alarm. When such a rule is imposed by so respected a state court as the New York Court of Appeals, and becomes applicable in a jurisdiction which is the public media capital of the United States, immediate and direct action by this Court to correct the situation is warranted.

The New York Court of Appeals Improperly Held that Petitioners' Use of Rhetorical Hyperbole Could be Defamatory

This Court has recognized that the rhetorical use of words which might otherwise be defamatory does not support an action for defamation. The decision below, while paying lip service to this principle, incorrectly departed from it in finding the Campaign Letter susceptible to a defamatory interpretation. Moreover, this Court should grant the writ of certiorari requested herein because the Court of Appeals decision is inconsistent with the prior decisions of this Court.

In *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), the Court reviewed a plaintiff's libel verdict based upon the defendant union's use of the word "traitor" to refer to two non-union letter carriers. Finding that the word was used in a "loose, figurative

sense," 418 U.S. at 284, the Court reversed the judgment, finding that the word did not defame plaintiff. Four years earlier, in *Greenbelt Cooperative Publishing Association v. Bresler,* 398 U.S. 6 (1970), the Court overturned a plaintiff's verdict in a libel case which was based upon a newspaper's reporting that in sessions of the Greenbelt City Council, the plaintiff's negotiating position with respect to a certain matter had been characterized as "blackmail." The Court found that the word was not used to accuse plaintiff of a criminal act, but rather as "rhetorical hyperbole, a vigorous epithet." 398 U.S. at 14.

Similarly, in the instant case, petitioners' use of the word "corruptness" did not imply that respondent had engaged in criminal conduct, but rather was merely a rhetorical extension of Lord Acton's well-known aphorism that: "Power tends to corrupt, and absolute power corrupts absolutely." In this context, the word "corruptness" could not reasonably be understood to charge respondent with criminal conduct. Accordingly, the use of the word by petitioners in the Campaign Letter does not give rise to a cause of action for libel, particularly since it was circulated in the heat of an election campaign, where the use of pointed and harsh language is commonplace.

This case is significantly different from cases such as *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, *cert. denied,* 434 U.S. 969 (1977) and *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980), in which each of the plaintiffs was clearly accused of having engaged in criminal activity. In *Rinaldi,* writer Jack Newfield, in referring to plaintiff, stated: "My instincts smelled a rat," and then accused him of criminal conduct 42 N.Y.2d at 376, 397 N.Y.S.2d at 947; in *Cianci,* the magazine *New Times* charged plaintiff with having committed a gun-point rape, and having then paid off the victim to avoid prosecution.

The Campaign Letter is a far cry from the facts of *Rinaldi* and *Cianci,* and the decision of the Court of Appeals, which groups the instant case with those cases, is so plainly wrong that

it erodes the wide latitude for rhetorical hyperbole established by this Court in *Letter Carriers* and *Greenbelt*. Under these circumstances, this Court should correct the error and affirm the principle it created.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York
July 5, 1983

/s/

.....

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APPENDIX

State of New York

COURT OF APPEALS

No. 169

ARTHUR R. SILSDORF,
Appellant,

v.

HARRY LEVINE, et al.,
Respondents.

(169) Milton S. Teicher, NY City, for appellant. Robert E. Zimet, NY City, for respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

WACHTLER, J:

At issue on this appeal is the scope of constitutional protection to be afforded allegedly defamatory statements, expressed in the form of opinions concerning plaintiff's performance while in public office. We hold that, in the procedural posture in which this case reaches us, plaintiff's allegations are legally sufficient to state a cause of action for defamation. The complained of statements, although constituting opinions and therefore entitled to a measure of constitutional protection, may nevertheless form the basis for a defamation claim, inasmuch as plaintiff has alleged that the facts set forth by defendants in support of their opinions are false. Accordingly, defendants' motion to dismiss for failure to state a cause of action should have been denied.

Plaintiff, an attorney admitted to practice in the State of New York, served as Mayor of the Village of Ocean Beach from 1956 until he lost his bid for reelection in 1978. During the

course of the 1978 campaign, an open letter concerning plaintiff's administration of the affairs of Ocean Beach was circulated to the village residents. Written upon the stationery of the Citizens Party of Ocean Beach, an unincorporated association which opposed plaintiff's reelection, and signed by four former trustees of the village, the letter expressed concern over perceived conflicts of interest and improper conduct on the part of plaintiff in his capacity as Mayor and urged that plaintiff not be reelected.

Specifically, the letter states that plaintiff had found his public office increasingly helpful to his private law practice and that business promoters, seeing the opportunity to make money in Ocean Beach, "have found it pays to do business with the mayor". In addition to the allegation that he unethically represented clients whose interests were adverse to those of the village residents, plaintiff was accused of flagrantly disregarding the authority of the Village Board of Trustees, "by relieving the elected members of the Board of their assigned duties, resulting in one-man rule", granting written authorization to a restaurant to bring excursion boats to Ocean Beach in violation of a village ordinance and permitting a lateral ferry to dock at 2:00 a.m. contrary to a board determination. The letter points out that plaintiff failed to intervene in a proceeding pending before the State Liquor Authority involving a particularly troublesome local bar. Rather than seeking to have the bar's license suspended or revoked, plaintiff allegedly represented the bar in this proceeding. The letter also states that village residents had gone to court to prevent plaintiff from improperly issuing a commercial building permit to one of his private clients.

Having set forth these examples of plaintiff's perceived misconduct in public office, the penultimate paragraph of the letter states:

> "There are many of us who recognize Arthur Silsdorf's [plaintiff's] service to the village in the past, and

> who have supported him in the past. But we also recognize that 'power tends to corrupt, and absolute power corrupts absolutely'. There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach."

It is this paragraph upon which plaintiff's action for defamation, brought after his reelection defeat, primarily focuses. Plaintiff's complaint, asserting a cause of action against the four signatories of the letter, as well as the officers of the Citizens Party of Ocean Beach, alleges that defendants, through the letter, falsely charged plaintiff with criminal corruption, the sale of favors in his official capacity and corruptly profiting in his private law practice at the expense of the village. Defendants, it is further alleged, published these defamatory statements with actual malice, in that they knew or should have known that the statements made were untrue.

Defendants moved to dismiss the complaint upon the ground that it failed to state a cause of action in that the statements complained of were constitutionally protected expressions of opinion for which liability in defamation may not be imposed. Special Term's order denying the motion to dismiss was reversed by the Appellate Division, with two Justices dissenting. A majority of the Appellate Division agreed with defendants that the complaint fails to state a claim for libel, because the alleged defamatory statements are nonactionable opinions. The court also noted that dismissal of the complaint was mandated upon the further ground that plaintiff's claim of actual malice "falls by the wayside" in view of his failure to contest the facts upon which the opinions were based. We now reverse the order of the Appellate Division.

The issues raised on this appeal come before the court in the procedural posture of a motion to dismiss the complaint for failure to state a cause of action. Thus, we accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim. If, upon any reasonable

view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509).

Initially, we note the well-established principle that it is for the court to decide whether the statements complained of are "reasonably susceptible of a defamatory connotation", thus warranting submission of the issue to the trier of fact (*James v Gannett Co., Inc.*, 40 NY2d 415, 419; *Mencher v Chesley*, 297 NY 94, 100). The entire publication, as well as the circumstances of its issuance, must be considered in terms of its effect upon the ordinary reader. We have no difficulty in concluding that the statements identified by plaintiff as defamatory, hold him up to public disgrace and contempt so as render them, if false, libelous (*Rinaldi v Holt Rinehart & Winston, Inc.*, 42 NY2d 369, 379, cert den 434 US 969). Clearly, false statements that "it pays to do business with the mayor", that plaintiff is profiting in his private law practice at the village's expense and that his administration is corrupt, having great potential for injury to plaintiff's reputation, are capable of being interpreted as defamatory.

That the statements may be defamatory does not, of course, end our inquiry, for defendants have urged that the statements are constitutionally protected as expressions of opinion. Whether the statements constitute fact or opinion is a question of law for the court to decide (*Rinaldi v Holt, Rinehart & Winston, Inc., supra*, at p 381). Although the distinction between fact and opinion may be difficult to draw in some cases, the conclusory statements in defendants' letter concerning plaintiff's performance and qualifications as mayor are clearly set forth in the form of opinion. As such, they are entitled to a certain measure of constitutional protection (*Gertz v Robert Welch, Inc.*, 418 US 323, 339-340; *Rinaldi v Holt, Rinehart & Winston, Inc., supra*, at pp 380-381; *Cianci v. New Times Pub. Co.*, 639 F.2d 54,61-64). This extraordinary protection of possibly defamatory statements is justified by our commitment

to the principle that free and open debate on matters of public concern is not to be discouraged by the spectre of the imposition of libel damages for the expression of a harsh or unpopular opinion.

Notwithstanding the importance of protecting this form of expression even to the extent of denying recompense for injury to an individual's reputation, the immunity afforded the expression of opinion obtains only when the facts supporting the opinion are set forth (*Rinaldi v Holt, Rinehart & Winston, Inc., supra,* at p 381). The purpose of this requirement is to ensure that the reader has the opportunity to assess the basis upon which the opinion was reached in order to draw his own conclusions concerning its validity.

In the present case, defendants contend that they have set forth the facts supporting their published opinions concerning plaintiff and that they are therefore entitled to constitutional protection from liability for defamation. Defendants maintain that plaintiff has not challenged the accuracy of the letter's factual statements, but has merely disputed the conclusions drawn by defendants from the stated facts. If this were as far as plaintiff's allegations went, we would agree that the opinions complained of could not form the basis for a defamation cause of action. Plaintiff has not, however, limited his claim to the invalidity of the conclusions drawn by defendants regarding his performance and qualifications. Rather, his affidavit in opposition to the motion to dismiss assails virtually every statement of fact contained in the letter as either a "gross distortion" or "misrepresentation of fact". Although it is unnecessary to describe every inaccuracy detailed by plaintiff, a few examples illustrate the nature of factual disparities.

Defendants' letter characterizes plaintiff's administration as "one-man rule", brought about by plaintiff's disregard of the board's authority and unilateral actions taken in violation of village ordinance and board directive. In response to these statements, plaintiff alleges that he did not, as stated in the

letter relieve board members of their responsibilities, thus thwarting the democratic process; rather, following a dispute, he merely withdrew authority he had previously delegated to board members and immediately delegated that authority to others. To the accusation that he allowed excursion boats to be brought to the village in violation of an ordinance, plaintiff responds that, in view of the questionable constitutionality of the ordinance, he and a village trustee had worked out a settlement with a restaurant that had been issued numerous summonses for violation of the ordinance, allowing it to honor its bookings for a given period of time. Further, defendants' statement that plaintiff permitted a ferry to dock in violation of a board directive is alleged to be entirely untrue, inasmuch as plaintiff never authorized or permitted such landings.

Although plaintiff is accused of failing to intervene on behalf of the village in a pending State Liquor Authority proceeding, instead, representing the bar, plaintiff points out that defendants' implication that he had an obligation to take some action on behalf of the village is entirely without basis. Moreover, although he appeared as attorney of record for the bar to enter a "not guilty plea" and testified as a character witness for the bar's owner, plaintiff otherwise had no involvement with the proceeding. Finally, plaintiff asserts that the State Liquor Authority proceeding was in no way related to the village or its ordinances and the complaint was eventually dismissed.

A final example of plaintiff's efforts to demonstrate the false impressions created by defendants' alleged distortions of fact involves the accusation that village residents took plaintiff to court to prevent him from improperly issuing a building permit to one of his clients. In sharp contrast to the implication that plaintiff unethically and perhaps illegally sought to benefit a client and thus misused his public office, plaintiff alleges that at the time the building permit was applied for, approved and issued, he did not represent the applicant in any capacity or for any purpose. Plaintiff's involvement with the issuance of the

permit was limited to confirming as a matter of course, the building inspector's approval of the application. Some time after the applicant had completed work under the permit, plaintiff prepared several leases for him. Thereafter, a local group attempted to have the building permit set aside, but the action was discontinued.

Clearly, the validity of the opinions expressed in the letter, as viewed by the average reader, could be affected by whether the facts as stated by defendants or those now alleged by plaintiff were before the reader. That being the case, plaintiff may be able to establish entitlement to recover damages for the defamatory opinions, assuming, of course, that he is able to demonstrate the falsity of the letter's statements of fact and convince the triers of fact that the factual disparities would affect the conclusions drawn by the average reader regarding the validity of the opinions expressed.

Equally important to our determination of the sufficiency of plaintiff's allegations is the nature of the opinions expressed by defendants. As noted, although expressions of opinion are constitutionally protected, accusations of criminal or illegal activity, even in the form of opinion, are not (see e.g., *Rinaldi v Holt, Rinehart & Winston, Inc., supra; Buckley v Littell*, 539 F2d 882, cert den 429 US 1062; *Cianci v New Times Pub. Co., supra*). Plaintiff contends that he stands accused of criminal corruption by the following statement in defendants' letter: "There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach". Defendants urge that this statement may not be interpreted as implying that plaintiff engaged in criminal behavior, particularly given the preceding reference to the oft-quoted aphorism of Lord Acton: "Power tends to corrupt and absolute power corrupts absolutely". We disagree and conclude that the statement, in the context of the entire publication, is susceptible of the interpretation offered by plaintiff. Prior to labelling plaintiff's administration "corrupt," defendants gave a detailed recital of plaintiff's conduct while in public office,

pointing out that business promoters had found that "it pays to do business with the Mayor" and that plaintiff had attempted to issue a building permit improperly to a private client. The unmistakable import of such statements is that plaintiff misused his public office and acted illegally to promote the interests of his clients and thus of himself. We conclude that the statement might reasonably be interpreted by the average reader as charging plaintiff with illegal conduct while in office. Particularly given this aspect of the claimed defamation, plaintiff's complaint must be deemed legally sufficient.

We note finally that defendants' concern over undue limitations upon expression in the course of political campaigns is misplaced. Even privilege has its limitations and even a public figure in the midst of a political campaign is entitled to some degree of protection. It is true that our society places a high value on the uninhibited and open debate necessary for the responsible functioning of political processes, to the extent even of protecting some falsity to avoid creating a chilling effect upon that expression (*New York Times Co. v Sullivan*, 376 US 254, 279; *Gertz v Robert Welch, Inc., supra* at pp 340-341). But sufficient protection is afforded defendants by virtue of the requirement that plaintiff prove actual malice. Plaintiff, as Mayor of the Village of Ocean Beach and participant in an election for that office, clearly is a "public official" for purposes of applying the *New York Times* rule. Thus, a constitutional prerequisite to plaintiff's recovery is that he prove that defendants published the defamatory statements with actual knowledge that they were false or with reckless disregard for their truth or falsity (*New York Times Co. v Sullivan, supra*, at p 280).

Plaintiff's complaint alleges the actual malice element of the defamation cause of action. In the present posture of this case, there is no reason to prevent plaintiff from attempting to prove that defendants published the letter with actual malice.

Accordingly, the order of the Appellate Division should be reversed, and the order of Supreme Court, New York County, denying defendants' motion to dismiss the complaint reinstated.

* * * * * * * * * * * * * * * * * *

Order reversed, with costs, and the order of Supreme Court, New York County, denying defendants' motion to dismiss the complaint reinstated. Opinion by Judge Wachtler. Chief Judge Cooke and Judges Jasen, Jones, Fuchsberg, Meyer and Simons concur.

Decided May 3, 1983

B-1

85 A.D.2d 297
447 N.Y.S. 2d 936

ARTHUR R. SILSDORF,

Plaintiff-Respondent,

v.

HARRY LEVINE, ALBERT RAGUSA, LOUIS WITKIN, ETHEL EPSTEIN and MICHAEL PRESNICK, NANCY VALE and SIDNEY PUDELL, individually and as Chairman, Secretary and Treasurer, respectively, of Citizens Party of Ocean Beach, an unincorporated association, Defendants-Appellants.

Supreme Court, Appellate Division,

First Department.

March 16, 1982.

ROBERT E. ZIMET, New York City, of counsel (Skadden, Arps, Slate, Meagher & Flom, New York City, attorneys), for defendants-appellants.

MILTON S. TEICHER, New York City, for plaintiff-respondent.

Before BIRNS, J. P., and SANDLER, LUPIANO, SILVERMAN and BLOOM, JJ.

BLOOM, Justice:

This case arises out of a political campaign conducted in the Village of Ocean Beach, Fire Island, New York. Plaintiff was a candidate for reelection as Mayor of the village. Defendants are of two categories. One group consists of four individuals who, at one time or another, had served as village trustees while plaintiff was Mayor. The other group consists of the officers of the Citizens Party of Ocean Beach, an unincorporated association which opposed the reelection of plaintiff and sponsored the election of another candidate.

Approximately a month and a half before the date of the election the individual defendants addressed an open letter to

their neighbors in the village, on the stationery of the Citizens Party, calling for the defeat of plaintiff and the election of the candidate of the Citizens Party. In that letter they charged that plaintiff, who is an attorney with offices in New York City, had conducted, in the early days of his mayoralty, little legal business affecting the residents of the village. However, as time progressed, business promoters saw the opportunity to make money in the village. By consequence "more and more of the mayor's law practice has been taken up representing discotheques, bars, fast food operators and others who would profit from increased day-and-night traffic on Ocean Beach". In addition to asserting that plaintiff, in opposition to the will of the trustees, favored the interests of those seeking increased traffic in the village the letter charged plaintiff with establishing one man rule; granting written authorization to a restaurant to bring in excursion boats in violation of a village ordinance; failing to intervene in a proceeding brought by the State Liquor Authority to revoke the license of a bar, and, in fact, representing the bar operator in those proceedings before the SLA; seeking to issue, improperly, a building permit to one of his clients and compelling residents of the village to institute court proceedings to prevent the issuance of the permit; and claiming credit for providing a youth center whereas in truth, he had voted against the rental of village property, known as "Windswept", to the youth center and had endeavored to sell the property "out from under the village. It was only after strenuous efforts by mothers from the youth group that other trustees outvoted the mayor by a 3-2 vote on September 6, 1969. 'Windswept' was saved, and rented to the youth group. Mayor Silsdorf voted against renting it to the youth group".

The letter draws to a close with a recognition of plaintiff's services to the village in the past. This is followed by two sentences which include the famous quotation from Lord Acton's letter to Bishop Mandell Creighton: "[b]ut we also recognize that 'power tends to corrupt, and absolute power corrupts absolutely.' There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach".

The election resulted in plaintiff's defeat. Thereafter, he brought this action alleging defamation. The complaint asserts one cause of action in libel. Defendants moved to dismiss. Special Term denied the motion asserting that "the complaint meets the minimal statutory pleading requirements to state a cause of action for libel". We disagree. Accordingly, we reverse and dismiss the complaint.

Two issues are tendered by the parties; first the scope of permissible judicial review on a motion to dismiss a complaint upon the ground that it fails to state a cause of action; and, secondly, whether the complaint, judged by those standards, sets forth a cause of action.

I

The Civil Practice Law and Rules gives greater depth to a motion to dismiss than did the Civil Practice Act by according the court the power to treat such a motion as a motion for summary judgment (CPLR 3211[c]). However, the right to do so is limited by the condition that before so doing the court must give adequate notice to the parties. Here, Special Term expressly abstained from giving such notice. Hence, our focus is limited to the complaint itself (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970). We are required to read the publication as a unitary whole (*James v. Gannett Co.*, 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834) and to assume the truth of the facts alleged and to construe them liberally (*219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889, 387 N.E.2d 1205; *Barr v. Wackman*, 36 N.Y.2d 371, 368 N.Y.S.2d 497, 329 N.E.2d 180). If, upon any reasonable construction of these facts, the allegations would entitle plaintiff to a recovery judicial inquiry comes to an end and the complaint must be adjudged to be sufficient (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17, *supra; 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205, *supra*).

Accordingly, we treat with the complaint facially, giving to the *facts* alleged therein a liberal and reasonable intendment for the purpose of determining whether it asserts a cause of action in libel.

II

It would be pointless to trace, in detail, the manifold changes wrought in the law of defamation by the seminal case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. It is sufficient for our purposes to start with the principle laid down in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-341, 94 S.Ct. 2997, 3007-3008, 41 L.Ed.2d 789, that:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas".

The New York courts have added but one element. They have required that the facts constituting the basis for the opinion be set forth so that the reader might judge for himself the validity of the opinion.

> "Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth." (*Rinaldi v. Holt, Rinehart, & Winston, Inc.*, 42 N.Y.2d 369, 380, 397 N.Y.S.2d 943, 366 N.E.2d 1299, cert. den. 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456; see also *Rand v. New York Times Company*, 75 A.D.2d 417, 430 N.Y.S.2d 271 [1st Dept.]; *Holy Spirit Ass'n v. Sequoia Elsevier Publishing Co.*, 75 A.D.2d 523, 426 N.Y.S.2d 759 [1st Dept.]).

There are occasions when the distinction between fact and opinion becomes blurred and differentiation between them becomes difficult (50 Am.Jur.2nd Libel and Slander § 289). Nevertheless, the question remains one of law, to be determined by the court (*Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *supra*).

Here, no such problem exists. There is a clear line of demarcation between fact and opinion. The open letter plainly sets forth both the opinions of the writers as well as the facts upon which those opinions are based and each is separate. While the entire letter is appended to the complaint as an exhibit, it is noteworthy that the particular portions excerpted in the complaint[1] deal with conclusions, i.e. opinions, based on the fact assertions set forth in the letter.

Plaintiff strains to give criminal implications to the final portion of the quoted material that "there is no longer any question about the corruption of Arthur Silsdorf's administration of the affairs of Ocean Beach". However, corruption does not necessarily entail criminal activity. Indeed, a more preferred meaning is a deviation from accepted or acceptable ethical or moral norms. Here, the facts purporting to signify corruption are set forth. Hence, the argument that they signify criminal activity carries no force. On that ground alone dismissal would be warranted.

III

However, there are additional grounds which mandate reversal.

Plaintiff, as an incumbent mayor and a candidate for reelection, had thrust himself into the public arena. To those to whom the open letter was addressed he was a public figure (*Rosenblatt v. Baer*, 383 U.S. 75, 76, 86 S.Ct. 669, 15 L.Ed.2d 597; *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57).

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[1] "* * * but in recent years, as more business promoters have seen the opportunity to make money at Ocean Beach, they have found it pays to do business with the Mayor * * * we are concerned because we believe the mayor is profiting from his private law practice at the expense of the Village of Ocean Beach * * * by unethically representing the people who seek to convert the village into a strip of pizza parlors, frozen custard stands and bars * * * there is no longer any question about the corruption of Arthur Silsdorf's administration of the affairs of Ocean Beach".

As such the statements contained in that letter are not actionable unless made with actual malice or unless made wantonly or recklessly and without regard to whether they were true or false (*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, *supra; Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094; *Rosenblum v. Metromedia*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296; *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *supra.*)

The claim that the statements were the product of actual malice or wanton and reckless disregard of the truth, falls by the wayside in light of the failure of plaintiff to contest the factual basis upon which the opinions are bottomed. Indeed, plaintiff's endeavor to negate them was to seek to explain the circumstances in which they occurred. Thus, his basic contention is that the opinions were not warranted. That, however, does not make the opinions actionable, since it cannot be said that the opinions do not flow reasonably from the facts set forth (*Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *supra*).

IV

Finally, it should be noted that the open letter was issued in the heat of a political campaign. It is singularly important, in a democratic society where the nature and philosophic direction of government is determined at elections, that debate be free, robust and unfettered (cf. *Gilberg v. Gioffi*, 21 A.D.2d 517, 251 N.Y.S.2d 823 [2nd Dept.], aff'd 15 N.Y.2d 1023, 260 N.Y.S.2d 29, 207 N.E.2d 620). Particularly is this true with respect to the voicing of opinion as to the past record of a candidate. Those who seek public office consciously subject their public lives to the careful and sometimes zealous scrutiny of those who oppose them. To reduce it to a pithy phrase coined by the late President Harry S. Truman, "If you can't stand the heat, don't go into the kitchen". To hold that opinions voiced in throwaways, leaflets, open letters and other

literature used in political campaigns are subject to the law of defamation would be to negate our long, and sometimes troubled, political history. (*Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35; *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597, *supra; Ocala-Star Banner Co. v. Damron*, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57, *supra*). It does not lie within our province to do so.

Accordingly, the order of the Supreme Court, New York County, entered July 14, 1981, denying the motion of defendants to dismiss the complaint should be reversed on the law and the motion granted and the complaint dismissed without costs.

Order, Supreme Court, New York County, entered on July 14, 1981, reversed on the law, without costs and without disbursements, the motion to dismiss the complaint granted and the complaint dismissed.

All concur except BIRNS and LUPIANO, JJ., who dissent in an Opinion by LUPIANO, J.

LUPIANO, Justice (dissenting).

The complaint herein alleges that plaintiff, an attorney, was the subject of a widely circulated leaflet (open letter), issued by the defendants, which was false and defamatory in content to the extent that

> "defendants not only charged plaintiff with the crime of corruption, but they also intended the words to mean that plaintiff, as mayor of the Village of Ocean Beach, sold favors in his official capacity, dealt corruptly with men seeking an opportunity to make money at the expense of the Village of Ocean Beach, profited corruptly in his law practice at the expense of the Village of Ocean Beach, and acted unethically and corruptly with persons doing business in and with the Village of Ocean Beach, all to the detriment of the said Village, and the publication was so understood by the readers thereof and by the general public" (Complaint, paragraph 8).

The complaint herein further alleges that the open letter was published and circulated with actual malice and that

> "(p)laintiff has at no time committed an unethical act either professionally or as mayor of the Village of Ocean Beach, nor has he ever represented any persons in any dealings by them with the Village of Ocean Beach, nor has he profited as an attorney at the expense of the Village of Ocean Beach, nor did he or his administration ever commit a crime or corrupt act, nor was his behavior at any time criminal or corrupt" (Complaint, paragraph 11).

As observed in *219 Broadway v. Alexander's*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205 [1979]:

> "Initially, we note the procedural posture in which this case comes before us. The sole question presented for our review is whether the plaintiff's complaint states a cause of action. As such, we accept, as we must, each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts. (See, *e.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 408, 413 N.Y.S.2d 895, 386 N.E.2d 807; *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 562, 289 N.Y.S.2d 404, 236 N.E.2d 634; *Kober v. Kober*, 16 N.Y.2d 191, 193, 264 N.Y.S.2d 364, 211 N.E.2d 817.) If we find that the plaintiff is entitled to a recovery upon any reasonable view of the stated facts, our judicial inquiry is complete and we must declare the plaintiff's complaint to be legally sufficient. (See, *e.g.*, *Dulberg v. Mock*, 1 N.Y.2d 54, 56, 150 N.Y.S.2d 180, 133 N.E.2d 695; *Condon v. Associated Hosp. Serv. of N.Y.*, 287 N.Y. 411, 414, 40 N.E.2d 230.)"

The open letter contains purported factual recitals and opinions based thereon. The accuracy of these recitals which form the foundation for the opinions is contested by plaintiff who has steadfastly maintained that the recitals are false. Defendants' claim of privileged opinion is based on the premise

that the letter disclosed the facts upon which their accusatory opinions were based. It is clear that to claim this privilege, *true,* not false, statements of fact must be disclosed. As aptly noted by the Court of Appeals in *Rinaldi v. Holt, Rinehart,* 42 N.Y.2d 369, 380, 397 N.Y.S.2d 943, 366 N.E.2d 1299 (1977):

> "The First Amendment does not recognize the existence of false ideas. 'However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *But there is no constitutional value in false statements of fact.*' (*Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3006-3007, 41 L.Ed.2d 789.) Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth. (*Buckley v. Littell,* 539 F.2d 882, 893, cert. den. 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed.2d 777 Restatement, Torts 2d, § 566.)" (Emphasis supplied).

The assertion in the letter that plaintiff's administration of the affairs of the Village of Ocean Beach is characterized by "corruptness" would likely be understood by the ordinary and average reader, in the context of the entire letter, as meaning that plaintiff had committed illegal and unethical actions.

> "Accusations of criminal activity, even in the form of opinion, are not constitutionally protected. (*Gregory v. McDonnell Douglas Corp.,* 17 Cal.3d 596, 604, 131 Cal.Rptr. 641, 552 P.2d 425 ...; cf. *Palm Beach Newspapers v. Early,* 334 So.2d 50, 52 [Fla.App.]; *St. Amant v. Thompson,* 390 U.S. 727, 730, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262; but see *Garrison v. Louisiana,* 379 U.S. 64, 76-77, 85 S.Ct. 209, 216-217, 13 L.Ed.2d 125, ...) While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction

between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior. (*Gregory v. McDonnell Douglas Corp., supra;* cf. *James v. Gannett Co.,* 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834 ....)" (*Rinaldi v. Holt, Rinehart, supra,* 42 N.Y.2d 382, 397 N.Y.S.2d 943, 366 N.E.2d 1299).

To impart the flavor of the context of the letter in which plaintiff is accused of corruptness and lack of ethics, plaintiff in his complaint specifically notes the following statements set forth in that letter:

> "But in recent years, as more business promoters have seen the opportunity to make money in Ocean Beach, they have found it pays to do business with the mayor .... We are concerned because we believe the mayor is profiting from his private law practice at the expense of the Village of Ocean Beach .... by unethically representing the people who seek to convert the village into a strip of pizza parlors, frozen custard stands and bars .... There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach."

Viewing the allegations of the complaint against the cardinal principles in the law of libel delineated above, and acknowledging that the defendants' motion is addressed solely to the sufficiency of the complaint as a pleading, rather than to its merits, it is concluded that the complaint states a cause of action.

It is also noteworthy that the letter is to be "considered as a whole, that its meaning depends, not upon isolated and detached statements, but upon 'the whole scope and apparent object of the writer' .... The writing must be 'read against the background of its issuance, under the circumstances of its publication' ... and construed, not with the high degree of precision expected of and used by lawyers and judges, but as it

would be read and understood by an ordinary member of the public to whom it is directed" (*Julian v. American Business Consultants,* 2 N.Y.2d 1, 23, 155 N.Y.S.2d 1, 137 N.E.2d 1 [1956]).

Accordingly, the order of the Supreme Court, New York County, entered July 14, 1981, which denied defendants' motion to dismiss the complaint for failure to state a cause of action in libel, should be affirmed.

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Supreme Court New York County

SPECIAL TERM PART I

Index #5983/79

ARTHUR R. SILSDORF,
Plaintiff,

—against—

HARRY LEVINE, ALBERT RAGUSA, LOUIS WITKIN, ETHEL EPSTEIN and MICHAEL PRESNICK, NANCY VALE and SIDNEY PUDELL, Individually and as Chairman, Secretary and Treasurer, respectively, of CITIZENS PARTY OF OCEAN BEACH, an unincorporated association,
Defendants.

GABEL, J.:

Defendants move for an order, pursuant to CPLR §3211(a)(7), dismissing the complaint for failure to state a cause of action.

This is a libel action arising out of the 1978 election campaign for the office of mayor of the Village of Ocean Beach, New York. The plaintiff in this action, Arthur Silsdorf, was the incumbent mayor and was seeking re-election. He is also an attorney. Mr. Silsdorf was defeated in his bid for re-election.

The defendants are the officers, of the Citizens [Party] of Ocean Beach, an unincorporated association (the "Association"). The complaint is predicated upon statements contained in a four-page campaign letter which was distributed to

Ocean Beach voters by the Association. Plaintiff asserts that his defeat at the polls was attributable to the letter, which he alleges is defamatory. A copy of the letter is annexed to and made a part of the complaint (CPLR 3014). In essence, it accuses Mayor Silsdorf of unethical conduct, conflict of interest, and corruption.

Since this §3211(a)(7) motion has not been converted into a motion for summary judgment (see CPLR 3211[c]), the proper focus is whether the complaint states a cause of action. (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 272 [1977]). On a motion to dismiss a complaint for failure to state a cause of action, every fact alleged must be assumed to be true and the complaint liberally construed in plaintiff's favor (*Barr v. Wackman*, 36 NY2d 371, 375 [1975]). If the plaintiff is entitled to a recovery upon any reasonable view of the stated facts, the complaint is legally sufficient (*219 Broadway Corp. v. Alexander's Inc.*, 46 NY2d 506, 509 [1979]).

The court will not pick out and isolate particular words and phrases but will consider the publication as a whole. (*James v. Gannett Co.*, 40 NY2d 415, 419-420 [1976]). The court will not strain to place an innocuous or a non-defamatory interpretation on the published words. (*Mencher v. Chesley*, 297 NY 94, 99 [1947]; *Gurda v. Orange County Publications*,—AD2d—[2nd Dept], NYLJ, 7/1/81, p.1, col. 6).

Assuming the truth of the allegations of the complaint—as the court must do on a CPLR 3211(a)(7) motion—and giving the plaintiff the benefit of every favorable inference, the complaint meets the minimal statutory pleading requirements to state a cause of action for libel.

This motion is addressed solely to the sufficiency of the complaint as a pleading, rather than to the merits of the complaint. As stated supra, the complaint, as a pleading, is legally sufficient. Defendants have failed to demonstrate that it is insufficient as a matter of law. Accordingly, the motion to dismiss is denied. This is without prejudice to the making of a motion for summary judgment, following joinder of issue, upon

a proper factual demonstration, should the parties be so advised. Such a motion need not be referred back to this court. Defendants are directed to answer the complaint within 10 days after the service of a copy of this order with notice of entry (CPLR §3211[f]).

Dated: July 7, 1981

/s/

J.S.C.

D-1

CITIZENS PARTY OF OCEAN BEACH
Ocean Beach, Fire Island, New York 11770

May 8, 1978

Dear Neighbor,

We are writing you as former trustees of the Village of Ocean Beach to tell you why we think it's important to elect Tom Schwarz as our new mayor on June 20th.

All of us have served as trustees with the incumbent mayor, Arthur Silsdorf, at one time or another in the past. We are convinced that he is no longer able to represent the people of this village, and that the private interests he represents, in fact, make it impossible for him to do so.

If you care about Ocean Beach, it is important to understand that this is not just another election for the sake of a "change," but that the future of the village itself is truly at stake.

As mayor, Arthur Silsdorf has found the office increasingly helpful to the growth of his private law practice in recent years. In the early days, the mayor conducted most of his law practice in New York City, occasionally handling a closing for someone who wished to buy or sell a house in Ocean Beach.

But in recent years, as more business promoters have seen the opportunity to make money in Ocean Beach, they have found it pays to do business with the mayor. As a result, more and more of the mayor's law practice has been taken up representing discotheques, bars, fast food operators and others who would profit from increased day-and-night traffic in Ocean Beach.

Only a year ago, all four members of the present Village Board of Trustees, unable to control the mayor's flagrant disregard of majority rule, wrote to residents of the village:

> "The mayor legally represents many whose interests would best be served by increased traffic in Ocean Beach."

They added:

> "The mayor has thwarted the democratic process, by relieving the elected members of the Board of their assigned duties, resulting in one-man rule."

What may have gone unnoticed then, to some, who might have regarded it as simply a fight between the mayor and the trustees, were other disclosures by the board that:

> 1. The mayor had granted written authorization to a restaurant to bring numerous excursion boats into Ocean Beach in violation of a village ordinance.
>
> 2. The mayor had continued to permit a "lateral" ferry to Bayshore at 2:00 a.m. after the board had ordered that the late ferries be cancelled.

It was not until last summer, when Tom Schwarz, after a thorough investigation, brought the extent of the mayor's conflict to the public's attention, that many in the village became concerned.

In a series of disclosures, the mayor first denied, and then admitted:

> 1. There had been a proceeding before the State Liquor Authority to suspend the license of a particularly unruly and troublesome bar in Ocean Beach.
>
> 2. The mayor had failed to intervene in behalf of the village to request that the bar's license be suspended or revoked.
>
> 3. Instead, he had represented *the bar.*

We are concerned because we believe the mayor is profiting from his private law practice at the expense of the Village of Ocean Beach. He has a right to profit from his private law practice, of course. But we believe he no longer has a right to be mayor of Ocean Beach.

His behavior is improper, and those who would ignore it or condone it, do so at their own risk.

The consequences of his actions are serious for all of us. His statements are cynical and we believe his conduct can only be judged as "misconduct." Last week, in a letter to voters, his campaign committee deplored the "hordes of day trippers, the noise in the village," and other problems.

Yet these are problems which Arthur Silsdorf has helped create by round-the-clock ferry schedules, violations of the village's commercial building moratorium, and finally by unethically representing the people who seek to convert the village into a strip of pizza parlors, frozen custard stands and bars.

Even now as residents of the village have gone to court to prevent the mayor from improperly issuing a commercial building permit to one of his private clients, Arthur Silsdorf talks of dedication and controlling "over-commercialism."

Those of us who served on the Village Board of Trustees with the mayor can only rub our eyes with disbelief at a statement by his campaign committee last week that the "mayor's bold and forthright actions have provided us with 'Windswept' activities center to "have a thriving youth group and teenage program." [sic]

The truth is that Arthur Silsdorf tried to sell "Windswept" out from under the village. It was only after strenuous efforts by mothers from the youth group that other trustees outvoted the mayor by a 3-2 vote on September 6, 1969. "Windswept" was saved, and rented to the youth group. Mayor Silsdorf voted against renting it to the youth group.

There are many of us who recognize Arthur Silsdorf's service to the village in the past, and who have supported him in the past. But we also recognize that "power tends to corrupt, and absolute power corrupts absolutely." There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach.

The village needs an honest, able mayor who can work together with other trustees to protect the future of the village. We believe Tom Schwarz is eminently qualified for that job, and we hope you will support us in electing him on June 20th.

Sincerely,

Ethel Epstein Harry Levine Al Ragusa Lou Witkin

P.S. In case you haven't already seen the program of Tom Schwarz and the Citizen's Party, we are enclosing a copy of their first brochure distributed at the beach earlier.

Supreme Court of the State of New York

COUNTY OF NEW YORK

ARTHUR R. SILSDORF,
Plaintiff,

Index No.

—against—

COMPLAINT

HARRY LEVINE, ALBERT RAGUSA, LOUIS WITKIN, ETHEL EPSTEIN and MICHAEL PRESNICK, NANCY VALE and SIDNEY PUDELL, individually and as Chairman, Secretary and Treasurer, respectively, of CITIZENS PARTY OF OCEAN BEACH, an unincorporated association,
Defendants.

Plaintiff, by his attorney, MILTON S. TEICHER, complaining of the defendants, alleges:

1. Upon information and belief, at all the times herein mentioned, defendants MICHAEL PRESNICK (Presnick), NANCY VALE (Vale) and SIDNEY PUDELL (Pudell) were members and associates of and were the Chairman, Secretary and Treasurer, respectively, of the CITIZENS PARTY OF OCEAN BEACH, an unincorporated association.

2. At all the times herein mentioned, plaintiff was the duly elected mayor of the Village of Ocean Beach, New York.

3. At all the times herein mentioned, plaintiff was and still is an attorney at law duly licensed and admitted to practice in the Courts of the State of New York and maintains an office for the practice of his profession at 350 Fifth Avenue, New York, N.Y. Plaintiff has always conducted himself with honesty and fidelity as an attorney and as a public official and at all times had an excellent reputation.

4. Plaintiff's earnings and his professional career depend not only upon his professional competence, but upon the continuance of the excellent name, reputation and esteem in which he has been held.

5. At all the times herein mentioned, plaintiff enjoyed a reputation for honesty, fairness and uprightness in his personal, professional and official dealings.

6. Heretofore and on or about May 8, 1978, and on various other occasions, defendants Presnick, Vale and Pudell, individually and as officers and associates of Citizens Party of Ocean Beach, and defendants Harry Levine, Albert Ragusa, Louis Witkin and Ethel Epstein, falsely and maliciously published or participated in the preparation and publication of, and widely circulated a leaflet under the emblem and banner of the Citizens Party of Ocean Beach, a copy of which is annexed hereto as Exhibit A, and made a part hereof, which leaflet contains, inter alia, the following false, libelous and defamatory matter:

> ". . . but in recent years, as more business promoters have seen the opportunity to make money at Ocean Beach, they have found it pays to do business with the mayor . . . we are concerned because we believe the mayor is profiting from his private law practice at the expense of the Village of Ocean Beach . . . by unethically representing the people who seek to convert the village into a strip of pizza parlors, frozen custard stands and bars . . . there is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach".

7. The above matter, published of and concerning plaintiff, was false and defamatory.

8. By these false and defamatory words defendants not only charged plaintiff with the crime of corruption, but they also intended the words to mean that plaintiff, as mayor of the Village of Ocean Beach, sold favors in his official capacity, dealt corruptly with men seeking an opportunity to make money at

the expense of the Village of Ocean Beach, profited corruptly in his law practice at the expense of the Village of Ocean Beach, and acted unethically and corruptly with persons doing business in and with the Village of Ocean Beach, all to the detriment of the said Village, and the publication was so understood by the readers thereof and by the general public.

9. The aforesaid libelous words were not only false and defamatory, but were published and circulated with actual malice, that is, with knowledge that the statements were false or with reckless disregard of whether or not they were false. Defendants knew, or with the exercise of reasonable care could have ascertained that the statements of and concerning the plaintiff were untrue, and the defendants acted therein in wilfull [sic] and wanton disregard of the truth and in a grossly irresponsible manner.

10. The aforesaid publication was made or participated in by each of the defendants with actual malice and with the design and intent to injure and damage the plaintiff and plaintiff's personal, official and professional reputation.

11. Plaintiff has at no time committed an unethical act either professionally or as mayor of the Village of Ocean Beach, nor has he ever represented any persons in any dealings by them with the Village of Ocean Beach, nor has he ever profited as an attorney at the expense of the Village of Ocean Beach, nor did he or his administration ever commit a crime or corrupt act, nor was his behavior at any time criminal or corrupt.

12. By reason of the acts and publication of defendants as aforesaid, the plaintiff has been held up to public contempt, ridicule, aversion and disgrace, and the same induced an evil opinion of him in the minds of the readers thereof and of the general public. Plaintiff has suffered great mental pain and anguish; he has been irreparably injured in his good name and in his profession, and his reputation among the general public has been gravely impaired.

13. By reason of the foregoing, plaintiff has been damaged in the sum of One Million ($1,000,000) Dollars and plaintiff seeks punitive damages in the sum of $1,000,000.

WHEREFORE, plaintiff demands judgment against defendants in the sum of Two Million ($2,000,000) Dollars, together with the costs and disbursements of this action.

MILTON S. TEICHER
Attorney for Plaintiff
350 Fifth Avenue
New York, N.Y. 10001
Tel: (212) 563-2323

Exhibit A
to the Complaint
is set forth as
Exhibit D
of this Appendix

F-1

Supreme Court of the State of New York

COUNTY OF NEW YORK

ARTHUR R. SILSDORF,
Plaintiff,

—against—

HARRY LEVINE, ALBERT RAGUSA, LOUIS WITKIN, ETHEL EPSTEIN and MICHAEL PRESNICK, NANCY VALE and SIDNEY PUDELL, individually and as Chairman, Secretary and Treasurer, respectively, of CITIZENS PARTY OF OCEAN BEACH, an unincorporated association,
Defendants.

Index No. 5983-79

VERIFIED ANSWER

Defendants Harry Levine, Albert Ragusa, Louis Witkin, Ethel Epstein, Michael Presnick, Nancy Vale and Sidney Pudell ("Defendants") by their attorneys Skadden, Arps, Slate, Meagher & Flom, answer plaintiff's complaint as follows:

1. Admit the allegations contained in paragraph 1 of the complaint.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint, except admit that from 1956 until July, 1978, plaintiff held the office of Mayor of the Village of Ocean Beach, New York.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except admit that plaintiff maintains an office for the practice of law at 350 Fifth Avenue, New York, New York, and deny on information and belief that plaintiff has always conducted himself with honesty and fidelity as an

attorney and as a public official and at all times had an excellent reputation.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4 of the complaint.

5. Deny on information and belief the allegations contained in paragraph 5 of the complaint.

6. Deny the allegations contained in paragraph 6 of the complaint, except admit that defendants, individually and as officers or members of the Citizens Party of Ocean Beach, circulated or participated in the preparation and circulation of an open letter under the name of the Citizens Party of Ocean Beach, the full text of which is annexed to plaintiff's complaint as Exhibit A.

7. Deny the allegations contained in paragraph 7 of the complaint.

8. Deny the allegations contained in paragraph 8 of the complaint, except deny knowledge or information sufficient to form a belief as to the understanding of the open letter referred to in paragraph 6 above by its readers and the general public, and state further that defendants intended that open letter to mean what it said when read as a whole.

9. Deny the allegations contained in paragraphs 9, 10 and 11 of the complaint.

10. Deny the allegations contained in paragraphs 12 and 13 of the complaint, except admit that plaintiff seeks punitive damages in the sum of $1,000,000 but deny that he is entitled to any damages in any amount by reason of the allegations contained in the complaint.

FIRST AFFIRMATIVE DEFENSE

11. The Court lacks jurisdiction over the persons of Ethel Epstein and Michael Presnick because service as to those individuals was improper.

SECOND AFFIRMATIVE DEFENSE

12. Defendants repeat and reassert their answers set forth in paragraphs 6 and 9 above with the same force and effect as if here set forth in full.

13. The open letter annexed as Exhibit A to plaintiff's complaint was prepared and circulated by defendants during the course of a campaign for the election of a Mayor for Ocean Beach, in which plaintiff was the incumbent candidate.

14. The open letter, annexed as Exhibit A to, and complained of in plaintiff's complaint was a privileged communication under the First Amendment to the United States Constitution, inasmuch as defendants, in preparing and circulating such open letter, acted in good faith and had a reasonable basis for belief in the truth of the contents of that open letter.

THIRD AFFIRMATIVE DEFENSE

15. Defendants repeat and reassert their answers set forth in paragraphs 6-9 above with the same force and effect as if here set forth in full.

16. The contents of the open letter annexed as Exhibit A to, and complained of in plaintiff's complaint are true.

WHEREFORE, defendants request judgment dismissing the complaint, and awarding to defendants their costs, expenses and disbursements of this action, including reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper.

Dated: New York, New York
April 12, 1979

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
Attorneys for Defendants
919 Third Avenue
New York, New York 10022
(212) 371-6000

VERIFICATION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

Harry Levine, being duly sworn, deposes and says:

1. That he is one of the defendants in this action and is united in interest with and pleads together with defendants Albert Ragusa, Louis Witkin, Ethel Epstein, Michael Presnick, Nancy Vale and Sidney Pudell;

2. That he has read the foregoing answer and knows the contents thereof; and

3. That the same is true to his knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

/s/

.....

Harry Levine

Subscribed and sworn to before me this 12th day of April, 1979.

/s/

.....

Notary Public

82-2165

Office-Supreme Court, U.S.
FILED
AUG 4 1983
ALEXANDER L. STEVAS,

Supreme Court of the United States

OCTOBER TERM, 1983

No. ——

HARRY LEVINE, ALBERT RAGUSA, LOUIS WITKIN, ETHEL EPSTEIN and MICHAEL PRESNICK, NANCY VALE and SIDNEY PUDELL, individually and as Chairman, Secretary and Treasurer, respectively, of CITIZENS PARTY OF OCEAN BEACH, an unincorporated association,

Petitioners,

v.

ARTHUR R. SILSDORF,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MILTON S. TEICHER
Attorney for Respondent
666 Fifth Avenue
New York, New York 10103
(212) 586-0541

August 2, 1983

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court should review the order of the New York Court of Appeals in reinstating Respondent's complaint by reason of its stating a good cause of action?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. ——

HARRY LEVINE, ALBERT RAGUSA, LOUIS WITKIN, ETHEL EPSTEIN and MICHAEL PRESNICK, NANCY VALE and SIDNEY PUDELL, individually and as Chairman, Secretary and Treasurer, respectively, of CITIZENS PARTY OF OCEAN BEACH, an unincorporated association,

Petitioners,

v.

ARTHUR R. SILSDORF,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

During a mayoralty campaign in 1978 the seven Petitioners circulated a printed letter (Exhibit D)[1] which described

[1] (Figures in parentheses refer to pages and exhibits of the Petition for a Writ of Certiorari)

Respondent, the incumbent mayor of the Village of Ocean Beach L.I., New York, who had been in office for twenty-two years, in the following defamatory terms:

> "But in recent years, as more business promoters have seen the opportunity to make money at Ocean Beach, they have found it pays to do business with the mayor... We are concerned because we believe the mayor is profiting from his private law practice at the expense of the Village of Ocean Beach... by unethically representing the people who seek to convert the village into a strip of pizza parlors, frozen custard stands and bars... There is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach."

Respondent commenced a libel action against Petitioners, setting forth the above language, verbatim, in paragraph 6 of his complaint(E-2).

Although Petitioners now argue that such accusations were merely "opinions", their verified answer nevertheless alleged that the contents of the letter "are true"(F-3).

Petitioners further urge that their charges such as "it pays to do business with the mayor", that the mayor is "profiting from his private law practice at the expense of the Village", that he is "unethically representing the people", and that there is "no longer any question about the corruptness" of the mayor's administration of the affairs of the Village, are protected opinions and not actionable. The Court of Appeals disagreed and held that the truth or falsity of the "facts" recited in the letter upon which Petitioners allege the statements were based, were issues requiring a trial.

Petitioners also groundlessly assert that the Court of Appeals decision will tend to "chill" discussion on public issues and hence constitutes an unreasonable restraint on free speech.

REASONS FOR DENYING THE WRIT

Petitioners raise a false issue in urging that freedom of political expression is on trial in this action and that the decision of the Court of Appeals ran counter to prior decisions of this Court.

On the contrary, the decision of the Court of Appeals followed the law as enunciated by this Court and by other Federal Court decisions. That Court merely restated the well-established principle that "although expressions of opinion are constitutionally protected, accusations of criminal or illegal activity, *even in the form of opinion,* are not." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, cert. den. 434 US 969 (1977) (Court's emphasis). The Court also cited *Cianci v. New Times Pub. Co.*, 639 F2d 54(2d Cir 1980), and *Buckley v. Littell*, 539 F2d 882, cert. den. 429 US 1062, in support of that proposition.

Petitioners suggest that this Court adopt a novel concept which is wholly at odds with established law. They urge that expressions of opinion, even though founded on false or undisclosed facts, have *absolute immunity*. They conclude that anything goes in a political campaign, including charges of criminal conduct, *even though no basis of fact for such charges exist*. Such a concept is alien to the principles enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Garrison v. Louisiana* 379 U.S. 64 (1964) and *Cianci, supra*, that false statements of fact are never constitutionally protected.

In *Garrison v. Louisiana, supra*, this Court made it crystal clear that falsehoods, deliberately published, do not enjoy immunity:

> "The use of calculated falsehood, however, would be a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity... That speech is used

as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. *Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*" (Emphasis added)

Petitioners erroneously rely on *Gertz v. Robert Welch, Inc., supra*, for the proposition that opinions cannot be made the basis of a libel action. On the contrary, *Gertz* specifically held that

"There is no constitutional value in false statements of fact."

The decisions of this Court and of the New York Court of Appeals on the subject of "opinion" immunity were extensively reviewed by the Second Circuit in *Cianci v. New Times Publishing Company, supra*. That Court observed that:

"...Our decision must mean that when an 'opinion' is something more than a generally derogatory remark but is laden with factual content, such as charging the commission of serious crime, the First Amendment confers no absolute immunity, as distinguished from the qualified protection accorded by *Sullivan* in the case of public figures."

The Court continued:

"Accusations of criminal activity, *even in the form of opinion*, are not constitutionally protected . . . While inquiry into motivation is within the scope of absolute privilege,

> outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, *in whatever form*, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior. (Citing cases)." (Court's emphasis)

After noting that nothing in its earlier decisions suggests that disclosure of factual background "would protect as opinion a direct accusation of criminal misconduct," *Cianci* continued:

> "Whatever may be the mode of expression used, if an assertion of guilt is implied or intended, the words will be actionable. *Logan v. Steele*, 1 Bibb 593, 595 (Ky. 1809)."

Even under *New York Times Co. v. Sullivan*, 376 U.S. 254, (1964) relied on by Petitioners, an aggrieved party may, by establishing the falsity of charges of criminal activity, recover damages from his defamers.

This Court, in denying certiorari in *Rinaldi v. Holt, Rinehart & Winston, Inc., supra*, refused to reverse a holding of the Court of Appeals that a lesser charge than in the case at bar, namely that a judge was *"probably corrupt"* was actionable. In the instant case the accusations went far beyond this, including positive charges of criminal activity such as: "there is no longer any question about the corruptness of Arthur Silsdorf's administration of the affairs of the Village of Ocean Beach", business promoters "have found it pays to do business with the mayor", "the mayor is profiting from his private law practice at the expense of The Village of Ocean Beach", and that he is "unethically representing people".

Petitioners' "chilling effect" argument is nothing less than a red herring. No freedom of speech issue is involved here. As one New York Appellate Court stated, the "chilling effect" argument

"has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion even though the case did not remotely concern the question." *Brady v. Ottaway Newspapers, Inc.*, 84 A.D. 2d 226. (NY 2nd Dept., 1981)

Petitioners are attempting to distract attention from the *procedural* issue decided by the Court of Appeals, to a *non*-issue, namely freedom of political expression. That was never an issue and all the Court of Appeals decided was that Respondent's complaint stated a good cause of action and that he had a right to have his day in court.

Further review by this Court is clearly unwarranted.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
August 2, 1983

Respectfully submitted,

MILTON S. TEICHER
Attorney for Respondent
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New York, New York 10103
(212) 586-0541